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No. 94-859

In The Supreme Court of the United States

October Term, 1994

Bruce Babbitt, Secretary of the Interior, *et al.*,
Petitioners,

v.

Sweet Home Chapter of Communities for a Great Oregon, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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AMICUS CURIAE BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF RESPONDENTS

The Competitive Enterprise Institute (CEI) hereby files this amicus curiae brief in support of the respondents in this case. Pursuant to Supreme Court Rule 37.3, letters of consent to this filing have been obtained from counsel for all parties and have been lodged with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

CEI is a non-profit research and advocacy organization committed to the principles of free enterprise and limited government, and to advancing private solutions to regulatory issues. CEI is incorporated in the District of Columbia as a tax-exempt organization. Through its pub-

lications, forums and litigation activities, CEI has been actively involved in such issues as private property rights and wildlife conservaton.

CEI submits that, through the regulatory definition of "harm" promulgated by the Fish & Wildlife Service (FWS) in 1981, 50 C.F.R. § 17.3, the Secretary of the Interior has employed unauthorized means to reach the Act's goal, in the process illegally imposing the burden of achieving that goal onto private property owners and other non-federal entities. CEI submits this brief to assist the Court in understanding how the Secretary actually applies the "harm" regulation in practice, to the detriment of private landowners and in violation of the Act itself.

SUMMARY OF ARGUMENT

There is little doubt that Congress was well aware of the problem habitat loss posed to wildlife, as the legislative history of the Endangered Species Act (ESA or Act) is replete with such evidence. *See, e.g.*, S. Rep. No. 307, 93d Cong., 1st Sess. 2 (1973); H.R. Rep. No. 412, 93d Cong., 1st Sess. 2 (1973). However, what cannot be found in either the ESA's legislative history or its statutory design is any indication that Congress intended to prevent habitat loss on private property through Section 9's prohibition on "take." 16 U.S.C. 1538(a)(1).

Through the promulgation of its 1981 regulatory definition of "harm" within the meaning of "take," the government exceeded its statutory authority and sought to prohibit "habitat modification" through its "harm" definition. In a vain attempt to restrict "harm" within the statutory ambit of "take," the government's definition of "harm" is ostensibly limited to acts which "actually injure or kill" protected wildlife. 50 C.F.R. § 17.3. Yet the government routinely implements "harm" without any proof of such effects whatsoever. In practice, the government simply presupposes that modification of endangered species' habitat constitutes a prohibited "take."

We submit that the government's "harm" regulation is among those rules which, "by requiring land to be left in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2894-95 (1992). In order to prevent this abusive practice from continuing, the decision below should be affirmed.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S ARGUMENTS REGARDING THE OSTENSIBLE LIMITATIONS OF ITS DEFINITION OF "HARM", ITS "HARM" REGULATION IS REGULARLY IMPOSED ON PRIVATE PROPERTY WITHOUT ANY SHOWING OF ACTUAL DEATH OR INJURY WHATSOEVER.

The government argues that the Court of Appeals "failed to take into account the fact that the requirement of showing 'actual death or injury' directly traceable to habitat-disturbing actions imposes significant limitations on the regulation's application". Pet. Br. 45. According to the government, "the carefully tailored 'harm' regulation does not apply to habitat modification or degradation generally. It is limited to such actions that actually kill or injure." Pet. Br. 16.

As is shown below, however, in practice the Secretary ignores such vague constraints and interprets the "harm" regulation to impose federal land-use controls on the basis of listing. The Secretary himself has written:

> "When a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land." [1]

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[1] Bruce Babbitt, "The Triumph of the Blind Texas Salamander and Other Tales from the Endangered Species Act," *E Magazine,* March/April 1994, at 54-55.

For purposes of this case, whether the Secretary really ever "will later free up the land" is immaterial. The real issue is whether he has the authority to "freeze" it in the first place.

The interpretation of "harm" illustrated by this quote is effectively the same prohibition on habitat modification that the Senate deleted from the ESA before its passage in 1973. *See* JA 60-61. As the government admits, that prohibition "would have made *all* destruction, modification or curtailment of a listed species' habitat or range a 'take,' regardless of the effect on a listed species". Pet. Br. 16.

The only authority the Secretary could possibly have for such a "freeze" is the government's interpretation of "harm." As illustrated below, a significant body of official correspondence from FWS to private landowners makes it clear that the Secretary's actual interpretation of "harm" is far different than what he presents to this Court.

A. The FWS Routinely Concludes That Modifying "Suitable" Habitat Is Tantamount To Violating The Act.

Margaret Rector, now a 75 year-old retiree, purchased 15 acres of prime Texas real estate in 1973 as an investment, hoping to later sell the land to supplement her retirement income. However, in 1990, about the time Ms. Rector began trying to sell her property, the golden-cheeked warbler (a neotropical migratory songbird) was listed as "endangered" under the ESA. 55 Fed. Reg. 18,844 (1990). "I have tried to sell this property for the past five years," Ms. Rector laments. "Dozens of prospective buyers have inquired about my land as it is in a fast growing area of the county. When told of the restraints placed on it by the ESA, they are no longer

interested." The assessed value of her land plummeted from $830,960 in 1991 to $30,380 in 1992.[2]

Such restraints and losses are the result of the Secretary's interpretation of "harm", which is the only descriptor within the meaning of 'take" that the FWS claims authorizes land-use regulation. JA 50. In 1992, the FWS conducted an "endangered species habitat assessment" of Ms. Rector's 15 acres, and found that it "contains mature oak-juniper woodland that constitutes suitable golden-cheeked warbler habitat." [3] On this basis alone, the FWS concluded:

> "Due to the likelihood of encountering warblers during some portion of the breeding season, it is our opinion that surveying your property would be unnecessary. As we discussed in our January 30 meeting, we believe that a Section 10(a) permit would be required to clear habitat or develop your property." [4]

A Section 10(a) permit is an "incidental take" permit. 16 U.S.C. § 1539(a)(1), (a)(2). Thus the FWS concluded that a "take" would result from habitat modification without even surveying the property to determine whether members of a listed species were actually present, let alone determining whether such modification would "actually injure or kill" any member of such species. This interpretation of "harm" clearly defies the judicial interpretation that "harm" only extends to activities that "actually, as opposed to potentially, cause harm." *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993).

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[2] Personal Remarks Regarding Land Problems Encountered With the USF&WS Over the Endangered Species Act Rulings, Attachment G to a letter from Margaret Rector to Senator Orrin G. Hatch, Nov. 1994.

[3] Letter to Margaret Rector from Sam D. Hamilton, FWS Field Supervisor, Feb. 18, 1992.

[4] *Id.*

In 1993 the FWS sent Ms. Rector another letter, reiterating its impermissible interpretation of "harm": "We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates." [5] Without even knowing *which*, if any, of the six species in question might potentially reside on Ms. Rector's land, the FWS concluded: "We believe that clearing or development-related activities of this acreage would constitute a 'take' as defined by the Endangered Species Act." [6]

Other residents of Travis County, Texas, have had similar encounters. Marj and Roger Krueger, for example, spent over $40,000 on a 1.5 acre lot on Foxtree Cove, the only lot on the cul-de-sac that did not have a house or a foundation already built. They spent another $10,000 on architects, attorneys and biologists. The Krueger's lot had been cleared of vegetation well before the golden-cheeked warbler was even listed as "endangered." Nonetheless, because golden-cheeked warblers had been sighted in "the canyons adjacent to Foxtree Cove," the FWS concluded "that authorization under the Endangered Species Act would be required" before they could begin construction on their lot.[7]

Such an interpretation of the Section 9 "take" prohibition is hardly consistent with the government's assertion

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[5] Letter to Margaret Rector from Sam D. Hamilton, FWS State Administrator, June 8, 1993.

[6] *Id.*

[7] Letter to Lee Sherrod, Horizon Environmental Services, Inc. from Sam D. Hamilton, FWS State Administrator, July 9, 1992. In an earlier letter, the FWS had informed Mr. Sherrod that the lot was "adjacent to one of the largest blocks of contiguous, occupied golden-cheeked warbler habitat remaining in Travis County," adding that building the Krueger's home "could result in a violation of Section 9." Letter to Lee Sherrod from FWS, July 25, 1991, at 1. However, the FWS noted that building a house on another lot across the street on Foxtree Cove that already had a foundation built on it "would not be in violation of Section 9" because it was "located between existing homes." *Id.*

that harvesting timber on unoccupied habitat could violate Section 7 but "would not . . . be prevented by the Section 9 'take' prohibition". Pet. Br. at 42. Nor does the "harm" regulation as applied in the Krueger's case comport with the limiting qualifications of the Secretary's 1981 revision of the "harm" regulation: "To be subject to section 9, the modification must be *significant,* must *significantly impair essential* behavioral patterns, and must result in *actual* injury." JA 72. But then again, there are few examples that do comport with such purported limitations.

MaBe, Inc. planned to build 173 homes in its Westminister Glen Subdivision, a 270 acre property in Travis County, Texas. During the 1980s, the company put in roads, utilities and other infrastructure on Phase I, 116.72 acres of the property that were platted for residential development long before the golden-cheeked warbler was listed in 1990. Phase II, the remaining 153 acres, was also platted for residential development. But soon after the warbler was listed, it became apparent that Phase II actually contained warblers—two pairs with fledglings. In order to obtain a 10(a) permit for Phase I, MaBe, Inc. was required to cede over Phase II to be managed as a warbler preserve under a conservation easement.[8]

In 1994, the FWS acknowledged that "yearly biological surveys conducted on the site since 1991 have not revealed the presence of the warbler on the Phase I development area proper."[9] Indeed, the FWS wrote, "construction of single-family homes within the Phase I area of Westminster Glen will alter *low quality warbler habitat areas which have not been documented to be utilized by the warbler.*"[10] Perhaps this "low quality warbler habi-

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[8] FWS, Environmental Assessment and Habitat Conservation Plan For Westminster Glen 1 (July 1994).

[9] *Id.* at 5.

[10] *Id.* at 15 (emphasis added).

tat" explains the warblers' four year absence from the property. Yet, as evidenced in the Krueger's case, no actual members of a listed species needed to be present for FWS to preclude someone from using their own land under its "harm" regulation:

> "Although the Phase I development area does not contain occupied warbler habitat, the Service considers the development of this area would result in direct destruction of warbler habitat which would result in indirect 'take' of one warbler territory." [11]

Why?

> "The Service currently believes that development activities in general will cause indirect impacts to the warbler due to habitat fragmentation, and an overall decrease of the contiguous habitat patch size. Encroachment of noise and activity within close proximity of nesting pairs, and introduction or increase of predator species (i.e., cowbirds, jays, house cats, fire ants) into otherwise low-predator density areas are also potential impacts of adjacent development." [12]

Thus, the FWS concluded that the nearest warbler would reduce its utilization of "a 250-foot band around the north, west and south perimeters of the developed lots compromising an additional 46.4 acres within which one warbler territory has been documented to occur." [13] After calculating the acreage of the impacted "perimeter," the FWS then calculated the "take" involved, on the assumption that each pair of warblers needs from 3 to 25 acres of habitat for "territory." [14] Since "indirect take is assumed to apply at 50 percent of the acreage . . . in-

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[11] *Id.* at 16.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 6.

direct take results in the net loss of 23.2 acres." [15] Half of the 46.4 acre perimeter equals 23.2 acres, which is roughly equivalent to one warbler "territory."

To reiterate, *none* of the 116 acres of land proposed for development had ever been documented to contain warblers. The "taking" involved not the "modification" of occupied habitat, but the "destruction" of perimeter habitat potentially utilized by warblers on land adjacent to the proposed development. In sum, the FWS explained, "a total of 107.4 acres (84.2 acres direct unoccupied low quality habitat and 23.2 acres indirect) of habitat with one documented territory and several sightings would be affected." [16]

Thus, the FWS claimed that the Section 9 prohibition of "take" would be violated by the "encroachment of noise and activity" within the 46.4 acre band around the perimeter of the proposed housing development. No "significant habitat modification or degradation" was involved. No "actual death or injury" was even alleged. The FWS simply calculated that "indirect take is assumed to apply to 50 percent of the acreage." In other words, all the FWS needs to determine "harm" under the Secretary's definition is one sighting of one member of an endangered species within 300 feet of a proposed change to landscape that is not even utilized by endangered species. If such conditions are found, the FWS can assert that ordinary uses of private property violate federal law.

Such overreaching applications of the "harm" regulation are commonplace in Travis County. Indeed, according to one environmental consultant, the FWS's development restrictions in Travis County virtually ensure that no real "take" of warblers is even possible.

> "Every Section 10(a) permit and Section 7 biological opinion issued by USFWS that we have seen

[15] *Id.* at 16.

[16] *Id.*

> in the Austin area contains a condition that prohibits clearing of vegetation in areas occupied by warblers during the breeding season. Clearing is limited to those times of year when the birds are out of the country [Aug. 1-Mar. 1], which, needless to say, is a tremendous restriction to homebuilders. This clearing prohibition actually results in no "take" whatsoever . . . . Birds aren't actually physically harmed if trees are cut while they are in Central America . . . . Therefore, USFWS charges a developer with take, liberally delineates habitat to extort costly mitigation, and still finagles it so that no true take actually occurs." [17]

B. The FWS Equates "Taking" Habitat With "Taking" Wildlife.

Agency correspondence such as that quoted above makes it clear that the Secretary routinely conflates the "taking" of habitat with the "taking" of wildlife. As evidenced in the golden-cheeked warbler examples from Travis County, Texas, the FWS routinely uses the number of acres rather than the number of animals to determine "take".

Such regulatory abuses are precisely what the Secretary purportedly meant to avoid by revising the "harm" regulation in 1981. The "purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification *alone* without any attendant death or injury of the protected wildlife." 46 Fed. Reg. 54,748 (1981).

Yet such FWS claims continue to abound. In 1991, a resident of South Padre Island, Texas, wanted to build a marina for commercial use on his 3.7 acre tract of land. He was required to conduct a biological survey of the property, as piping plovers (a "threatened" species of

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[17] Letter to Ike Sugg, CEI, from S. Paulson, Division Director, SWCA Inc. Environmental Consultants, "U.S. Fish & Wildlife Service Interpretation of the Endangered Species Act in the Austin Area", Mar. 15, 1995, at 7-8.

migratory shorebird) were known to winter in the area. The nine-day survey was conducted in 1992. No plovers were seen on the property, but the consultant did observe "a flock of 18 piping plovers resting on a sand flat adjacent to the project site for a period of 11 minutes." [18]

Based on this observation, the FWS determined that "the project would directly impact 36,355 square feet of tidal flat/algal habitat . . . piping plover feeding and resting areas. . . . This degree of impact, 36,355 square feet spread over the 18 to 19 birds observed in the local flock, is considered to constitute an incidental take." [19] When asked by the Army Corps of Engineers "whether the incidental take identified in the draft biological opinion referred to the taking of habitat or of birds," the FWS Field Supervisor's response was as mysterious as his determination of the "taking":

> "The best possible quantification, given in the *Incidental Take* section, is 6% of the non-roosting habitat required to support a single bird, or, more realistically, the effects of such a loss spread over a flock of 18 to 19 piping plovers." [20]

Thus, based on one 11 minute observation of a flock of birds momentarily resting on another part of the beach, the FWS concluded that building the marina would constitute a "take"—of what, exactly, is rather unclear.

Of course, the "harm" regulation applies not just in Texas but across the entire country. On Washington State's Olympic peninsula, for instance, Anderson & Middleton Logging Co. has been prevented from logging

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[18] Letter to Colonel John P. Basilotto, U.S. Army Corps of Engineers, from Thomas E. Grahl, Acting FWS Field Supervisor, May 23, 1994 (Consultation No. 2-11-92-F-010), at 2.

[19] Grahl Letter, *supra* n.18, at 19, 23.

[20] Grahl Letter, *surpa* n.18, at 5.

timber on a 72 acre tract of private land due to an enforcement action filed against it by the government in December 1993. The reason for this action was that a pair of northern spotted owls were nesting, not on Anderson & Middleton's land, but on government land a full 1.6 miles away from the company's plot. *U.S. v. Anderson & Middleton Logging Co.*, C93-5697R (W.D. Wash. Dec. 9, 1993). A similar fate confronted Betty Orem, who owns 27 acres adjacent to the Olympic National Forest. When she applied for a permit to harvest the timber on her land, the permit was denied because of the existence of a spotted owl over a half mile away on the federal government's land.[21]

Such cases are indistinguishable in principle from the fact situation in *Forest Conservation Council v. Rosboro Lumber Co.*, 92-1114-HO (D. Ore. Nov. 18, 1993). In *Rosboro,* plaintiffs sued under the ESA's citizen suit provision to stop the company from harvesting timber on its own land because it was adjacent to federal land in which a pair of northern spotted owls resided. The court held that "an allegation of a speculative one-time future violation of the ESA which will not result in the extinction of a species is insufficient to establish an actionable taking."

Despite the fact that *Rosboro* was dismissed, it is precisely such "speculative" future effects that the FWS routinely considers to be a "take." Whether the FWS considers them actionable or not is immaterial; its mere assertion of "take," and the risk of criminal prosecution that it brings, is enough to dissuade most landowners from undertaking the costly task of defending their rights in court.

The examples from Texas and the Pacific Northwest also stand in stark contrast to the court holdings that destruction of suitable habitat does not in and of itself

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[21] A. Gidari, "The Endangered Species Act: Impact of Section 9 on Private Landowners," 24 Envtl. L. 419, 439 (1994).

constitute "take." *See, e.g., Morrill v. Lujan,* 802 F. Supp. 424, 430 (S.D. Ala. 1992) Even "scientific evidence supporting the conclusion that current excessive . . . [actions] are impairing essential behavioral patterns is [not] a sufficient basis on which to infer . . . death or injury . . . ." *Swanview v. Turner,* 824 F. Supp. 923, 939 (D. Mont. 1992).

Clearly, recent judicial clarification and narrowing of the regulatory ambit of the "harm" definition have not saved that regulation from abuse. To the contrary, regulatory regimes such as the one implemented in Travis County for the golden-cheeked warbler show that the regulatory definition of "harm" is interpreted liberally and applied expansively, well beyond what the government asserts to be its statutory limits. Thus it is the Secretary, and not the court below, who is postulating constructions that defy the regulation's purportedly narrow language. It is the Secretary who bases his actions on "an extravagant reading and speculative applications of the regulation" (Pet. Br. at 49), not the Court of Appeals.

II. BECAUSE IT DOES NOT REQUIRE ACTION DIRECTED AT, OR PHYSICAL INJURY TO, AN INDIVIDUAL MEMBER OF A LISTED SPECIES, THE GOVERNMENT'S "HARM" DEFINITION IS HOPELESSLY VAGUE AND INHERENTLY INCONSISTENT WITH THE MEANING OF "TAKE."

Even if the Secretary's actual interpretation of "harm" were limited to government's conservative reading of the regulatory definition, that definition is inconsistent with the structure and legislative history of the Act. There is no coherent way in which to interpret the Act's prohibition of "taking" listed species except to construe it as a prohibition against "taking" *individual members of listed species.* Because the Secretary explicitly rejects that construction, the regulation is invalid on its face.

A. "Take" Only Encompasses Actions Directed At Individual Members Of Listed Species.

Section 9 prohibits the "taking" of endangered species. 16 U.S.C. § 1538(a)(1). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). As is shown below, properly construed, section 9's prohibition of "take" applies only to individual animals.

Admittedly, the wording of the ESA itself confuses this issue by prohibiting the "take of any such species," rather than the individual members of such species. Section 1538(a)(1)(B). Yet it is clear that it is the taking of *individuals* that Section 9 prohibits; otherwise, that same section's prohibition on the importation of, possession, sale, delivery, carry, transport, or shipment of *"any such species"* (section 1538(a)(1)(D)) would be nonsensical. Similarly, it is manifestly impossible to "deliver, receive, carry, transport, or ship" a *species,* just as it is impossible to "sell or offer for sale in interstate commerce or foreign commerce any such species." Section 1538(a)(1)(F).

The only possible way in which one could do such things to or with a listed *species* in violation of Section 9 would be to do them with *each and every extant member of the species,* or with every living member of "any distinct population segment" of a species. 16 U.S.C. § 1532(16). Such a construction of the term "species" would render the prohibitions of Section 9 ludicrously hollow. Thus, since it is implausible to conclude that Congress meant to prohibit only those actions that impact every living member of a listed species, the only reasonable interpretation of Section 9's use of the term "species" is that it refers to *individual members* of listed species. *See also* Section 1532(8).

This same analysis holds for "take." One would be hard-pressed to "harass, pursue, hunt, shoot, wound, kill,

trap, capture, or collect" an entire species. Like the term "harm," all the words defining "take" are verbs that connote actions against individual animals. While Congress may not have been as clear as it could have been in writing the statute, in amending the statute to allow "incidental takings" Congress was not much clearer.

The House Committee describing the exemption process stated: "In order to obtain a permit, the private applicant must present the Secretary with a conservation plan demonstrating that he will minimize the incidental taking, and "*specify the number of species likely to be taken* . . . ."[22]

That the ESA's prohibition of "take" applies only to individual members is clear. "[S]ection 9's threshold does focus on individual members of a protected species." JA 68. Indeed, earlier in the case at bar, even the government acknowledged that the "taking" prohibition "requires evidence of actual physical impacts—killing or injury to wildlife—that is the general focus of Section 9." District Court Docket No. 13 at 21.[23] Ignoring this earlier statement, it now argues that no such physical impacts need be evidenced. Referring to the 1981 redefinition of "harm," the government instead notes approvingly that the Secretary "reaffirmed that 'harm' is not limited 'to direct physical injury to an individual member of the wildlife species.' " JA 67.

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[22] H.R. Rep. No. 567, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2831 (emphasis added).

[23] In an attempt to save the "harm" regulation from invalidation, the government added that Section 9 also had an "intent requirement," which, it argued, "vitiates any vagueness concerns." *Id.*, at 18. Because it seems wholly unjust to prosecute a man because an endangered bird flew into his windshield while he was driving his car, we would agree that the ESA's "take" prohibition must have some scienter requirement, which the government's current interpretation of "harm" clearly lacks.

The 1981 redefinition was prompted by *Palila v. Hawaii Department of Land and Natural Resources,* 471 F. Supp. 985 (D. Hawaii 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1981) (*Palila I*). In *Palila I,* habitat modification was deemed a violation of Section 9, "even though no killing or injuring of individual Palilas [birds] was demonstrated." JA 62. The Interior Department's Associate Solicitor determined that the decision in *Palila I* "exceed[ed] the statutory authority conferred by Section 9 of the Act," and recommended that the 1975 definition be redefined. JA 64. Analyzing the ten descriptors of "take" in Section 9, the Associate Solicitor concluded:

> "With the possible exception of 'harm,' these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis,* where general words accompany words of specific meaning, such general words are construed as applying only to actions of the same class as those specifically mentioned. *Goldsmith v. U.S.,* 42 F.2d 133 (2nd Cir. 1948). Applying this principle to the present construction problem, the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." JA 58.

The agency ultimately abandoned its proposed 1981 redefinition of "harm." The prohibition on habitat "modification or degradation" that impairs "essential behavioral patterns" was reinstated. 50 C.F.R. § 17.3. The FWS rejected limiting "harm" to "direct physical injury to an individual member of the wildlife species," as "[t]his was not the intent of the Service." JA 67. Notwithstanding this requirement—that the prohibited act be directed *against* wildlife—the government's rejection of the injury-to-individuals limitation, by itself, renders the current "harm" regulation invalid.

B. The Secretary's Interpretation Of "Harm" Results In Vague And Vast Regulation, And Relies On Scientific Theories That Congress Was Unaware Of In 1973 And Which Courts Have Since Rejected As Insufficient Grounds On Which To Establish "Take."

For all the government's emphasis on the purported limitations of "actual death or injury," that phrase can only mean direct physical injury to an individual animal. Even though death seems to fit no other construction, the FWS nevertheless rejects that standard. Barring psychological injury to individual wildlife, which could never be plausibly proven (or disproven), it is clear that the government believes that some indirect injury to the *species* constitutes "harm." Yet this construction violates both the maxims *ejusdem generis* and *noscitur a sociis*, as none of the other terms defining "take" are so broadly construed as to encompass either indirect actions or injuries to species (and would make little sense if they were).

The government defines "harm" to embrace indirect injuries to the species, rather than only direct injuries to individual members of the species. It insists that "Congress intended to create a definition of take which included all of the various ways of killing or injuring protected wildlife." JA 68. But since "taking" a *species* is as illogical as selling or transporting a species, the accepted maxims of construction dictate that "harm" must also focus on individuals.

Not only would construing "harm" in this way be more consistent with the other nine descriptors of "take," it would also avoid the problem of surplusage identified by the court below. Pet. App. 25a. A construction of harm that was limited to actions directed against individual wildlife would, for instance, prohibit poisoning wildlife, including instances where the effects of poisoning were not lethal. It is significant that "harm" is the

only one of the ten descriptors of "take" that would prohibit non-lethal poisoning.

Instead of embracing this standard, the government relies on a Senate Committee report defining "take" in "the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *See* S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). Yet this statement is circular, tantamount to "take means take," and thus adds nothing. *See* Pet. App. 71a. Moreover, this statement was made well before "harm" was even added to the statutory definition of "take," and is thus irrelevant to the issue of habitat modification at bar.

As Judge Sentelle pointed out in his dissent in the panel decision below, the FWS's exclusive focus on the effect of "harm" makes the other words in Section 9's definition of "take" superfluous. *Id.* at 71a-72a. If the government's habitat-modification-as-"harm" construction is not limited to physical harm to individual members of species, then subsection 7(a)(2)'s explicit prohibition on "adverse modification of habitat" as applied to actions with a federal nexus becomes surplusage. To avoid this problem, the government is forced to contradict its general argument and acknowledge that Section 9 necessitates "taking" individuals, and thus "a particular action may cause a taking of individual members of a listed species, but not adversely affect the species as a whole to such an extent that it violates the 'jeopardy' prohibition or critical habitat restrictions in Section 7(a)(2)." Pet. Br. 42.

The government's differentiation of Section 9's focus on individual wildlife from Section 7's focus on the species as a whole is correct, but it is inconsistent with the government's incorrect argument that "harm" does not require proof of "direct physical injury to an individual member" of a species. Pet. Br. 6, 15. The FWS rejected such proof in promulgating the 1981 regulation,

thus compelling the government to defend that rejection in order to save its regulation.

Rejecting proof of "direct physical injury to an individual member" of a listed species renders the "harm" regulation hopelessly vague. As the Environmental Defense Fund's Michael Bean has observed: "The problem is that it is impossible for most landowners to translate [the 'harm' definition] into clear and readily understandable rules regarding what they can or cannot do on their property." M. Bean, *Reconciling Conflicts Under the Endangered Species Act* 43 (1991). The government's rejection of such proof also leads to applications of the "harm" regulation that defy any reasonable standard of permissible construction.

As evidenced by applications of the "harm" regulation in Travis County, Texas, the FWS's policy is to prohibit all habitat modification in suitable habitat during the entire period that golden-cheeked warblers are known to frequent the state. "Incidental takings" are allowed only when the warblers have migrated to Mexico and Central America. *See* text accompanying n.17, above. Thus, no individual warblers could possibly be "taken," incidentally or otherwise, under the FWS's implementation of "harm" in Texas. And yet, the FWS routinely requires exorbitant "mitigation" for "incidental takings."

No matter how "significant" or insignificant the habitat modification might be, the only "behavioral patterns" impaired are those of non-existent animals. Perhaps the best example of this pertains to the black-capped vireo, which is similar to the warbler in that they both spend the spring in Texas and both are neotropical migratory songbirds.

Westview Development, Inc. wanted to build some homes on Davenport Ranch, a property owned by the company. Westview had already donated 74 acres of prime vireo habitat to a local preserve, and entered another 62 acres in a conservation easement that precluded

development. The FWS informed Westview that the development would directly "take" 22 acres of vireo habitat and, as a result of a 200 foot "buffer" zone of impact around the modification, another 10 acres would be "taken" indirectly. To "mitigate" for this 32 acre "taking," Westview was informed that it would have to purchase and manage a 100 to 500 acre vireo preserve.[24]

The FWS advanced two theories for this calculation: (1) "The 'take' analysis for the proposed development is based upon the acres of habitat lost rather than the number of territories . . . therefore, discussion of a specific territory is not directly related to the analysis." [25] Hedging against the illegality of this analysis, the FWS advanced another theory: (2) Modifying habitat when no vireos were even in the state would "take" two pairs and several generations of offspring. In effect, by the agency's logic the same animal can be taken more than once, and the wildlife purportedly "taken" need not even yet exist!

The FWS calculated that the reproductive potential for vireos averages one offspring per female, per breeding season. Based on its belief that two existing pairs of vireos would be "taken," the agency assumed that each pair would bear five to seven young. The FWS then calculated how many offspring the young would have. The result was a "loss of from 50 to 126 vireos. Using the figure that a vireo territory generally ranges from two to four acres, the land that would have to be purchased would range from 100 to 504 acres." [26]

No proof of such "taking" could be offered, as no vireos could be physically injured while they were hundreds or thousands of miles away from the development site. Yet even if development were allowed during the vireo's brief sojourn in Texas, there still was no proof

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[24] Letter to J.B. Ruhl from Sam. D. Hamilton, FWS State Administrator, at 6 (Oct. 28, 1993).

[25] *Id.* at 2.

[26] *Id.* at 5-6.

that any members of the species would be actually harmed. We submit as a matter of simple logic that future progeny cannot be "taken" until they come into being. Thus only two pairs could possibly be "taken" on Davenport Ranch. According to the FWS, those four vireos were "taken" because habitat suitable for their use would be modified.

The inescapable conclusion to draw from this and other such examples is that the government's "harm"-by-habitat-modification definition requires no real proof of "actual death or injury." The inclusion of "habitat modification" and "essential behavioral patterns" allows the FWS to deem any loss of potential habitat a "take." The presumption is either: (1) members of listed species will not be able to express behavior there once the habitat is modified; (2) the process of modification will impair the behavioral patterns of (and somehow injuring) individuals beyond the perimeter of the modification; or (3) the species as a whole will suffer lost reproduction and habitat in which future generations could disperse.

All of these presumptions are based on theories from conservation biology that did not come into existence until well after the ESA was enacted. Not until Mark Shaffer published his pioneering work on "population viability analysis" (PVA) in 1981 did conservation biologists have any scientific basis whatsoever for claiming that habitat fragmentation could be predicted to result in the loss of existing wildlife. *See* C. Mann and M. Plummer, *Noah's Choice: The Future of Endangered Species* 191 (1995).

Before that time, biologists had little more than the "species-area curve," which merely predicts that the number of species is proportional to the amount of available habitat. As implied in the amicus brief of scientists in support of the government, the very best species-area curve analyses cannot tell a scientist *which* species will be imperiled by habitat loss, let alone which individual animals. Perhaps that is why the scientists found "harm's"

requirement of direct injury to individual wildlife was "the most troubling aspect, from a scientific point of view." Brief of Amici Curiae Scientists John Cairns, Jr. *et al.* at 22.

According to its progenitor, Mark Shaffer, even the cutting-edge science of population viability analysis is inexact at best. "The life characteristics of fewer than a dozen species are known well enough to be used in these models." Moreover, says Dr. Shaffer, "I don't think anyone has looked at PVAs, seen the kind of data they require, and then gathered it—still less directly tested one." *Id.* at 193. Yet such models were relied on heavily in the case of the warblers and vireos in Texas (Mann and Plummer at 193-198), and served as the apparent basis for much if not all of the FWS's "harm"-by-habitat-modification determinations in Travis County.

Most courts have rejected the application of conservation biology's speculative theories to decisive questions of wildlife law. A. Gidari, *supra* n.21 at 423 (1994). As the First Circuit has found, the "proper standard for establishing a taking under the ESA, far from being a numerical probability of harm, has been unequivocally defined as a showing of 'actual harm.'" *American Bald Eagle* v. *Bhatti*, 9 F.3d 163, 165-166 (1st Cir. 1993). But the *de facto* biology-as-law standard informed by population viability analysis, and established by the government's "harm" regulation, leads inexorably to such numerical standards because it rejects the "direct physical injury" standard.

III. IN CONTRAVENTION OF THE ACT'S REVEALED DESIGN, THE REGULATORY DEFINITION OF "HARM" FACILITATES THE ILLEGAL IMPOSITION OF FEDERAL DUTIES ONTO PRIVATE LANDOWNERS

What becomes clear from reading agency correspondence to private landowners is that the FWS is using the "harm" regulation to impose the burden of "conserving"

wildlife onto the private sector. "Conserve" is defined in the Act as "the use of all methods and procedures which are necessary to bring any endangered species to the point at which the measures provided pursuant to this Chapter are no longer necessary." 16 U.S.C. § 1532(3). Yet the Act explicitly makes the duty to conserve that of the government, not the duty of private landowners or other nonfederal entities. 16 U.S.C. §§ 1531(c)(1), 1536(a).

The government and its supporting *amici* also conflate the duty to conserve with the obligation not to "take," as they argue repeatedly (Pet. Br. at 4, 18, 24) that Section 2 somehow supports the government's interpretation of "harm." The section on which they rely states that the Act's purpose is "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Yet the very next provision specifically assigns that duty to *federal agencies*: "It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve" listed species. Section 1531(c)(1).

As the language and structure of the Act make clear, the purpose of "conserving" wildlife is to recover them, to bring them to the point at which they no longer warrant the Act's protections. The government argues that its interpretation of "harm" does not prohibit habitat modification "that merely retards recovery". Pet. Br. 41. As shown below, however, this argument is untenable.

As revealed in Texas and elsewhere, the government's liberal interpretation of "harm" in the field lacks any showing of physical injury to individual animals. Not one of the examples cited above was predicated on a stated belief that the habitat modification in question would *prevent* recovery, let alone result in the species' extinction. The implicit basis for those determinations of "take" was that the habitat modifications would inhibit recovery.

Indeed, the regulatory definition itself includes the impairment of "essential behavioral patterns, including breeding, feeding or sheltering." Thus, habitat modification that indirectly decreases the reproductive success of just one member of a listed species can constitute a "take" under the most conservative interpretation of the government's definition of "harm." Simple logic dictates that a decrease in "breeding" necessarily "retards recovery."

In *Palila II*, the Ninth Circuit's interpretation of the government's "harm" regulation was unclear as to whether actions that retard or prevent recovery constitute "harm," but explicitly endorsed the interpretation that "harm" prohibits actions that might cause population declines. *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (*Palila II*). It is through this and other such interpretations of the government's "harm" regulation that the habitat modification provisions of Section 7 have been effectively transposed onto private landowners through Section 9.

The government's various theories of what constitutes "actual death or injury" within the meaning of "harm" result in *de facto* interpretations of the "harm" regulation that are the functional equivalent of federal agencies' responsibility under Section 7 to not "jeopardize the continued existence of" listed species. 16 U.S.C. § 1536(a)(2). The administrative definition of "jeopardy" prohibits actions that "would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival of that species." 50 C.F.R. § 402.2 (1981).

It should therefore come as no surprise that less than $254 million has been spent to purchase 359,755 acres for endangered species protection under the acquisition authority of 16 U.S.C. § 1534. Scientists' Amicus Br. 18. This, despite the fact that "the major change made by

the 1973 Act was the removal of all dollar limitations on the expenditure of money from the Land and Water Conservation Fund for acquisition. . . ." M. Bean, *The Evolution of National Wildlife Law* 402 (1977). This is a paltry sum, given that $18.213 *billion* went into the fund since 1965, of which sum Congress appropriated $8.541 billion to the Secretary to spend on acquisition.[27]

Nor is habitat being protected through Section 7 "critical habitat" designations, as such habitat has been officially designated for only 83 out of the nearly 1,000 listed species. Brief Amicus Curiae of National Wildlife Federation 26. This is not to say that habitat is not being protected. However, what these statistics suggest is that habitat is being protected through provisions other than those contained within Sections 5 and 7. We submit that it is through Section 9's "harm" definition that habitat is actually, and improperly, being protected under current FWS practice.

The regulatory definition of "harm" has also led to the legally questionable conditioning of "incidental take" permits on expansively wrought habitat conservation plans. *See, e.g.*, J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 S.W.L.J. 1393, 1402 (1991). Exceeding the authority vested in Section 10(a) creates *de facto* "critical habitat" without benefit of the statutory protections for designating such habitat, including notice-and-comment rulemaking and a consideration of the relevant economic impacts of such a designation. Section 1533(b)(2).

Finally, the fact that more than 44 million acres of

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[27] A. Teter, "Land and Water Conservation Fund Receipts, Appropriations and Unappropriated Balances Reported by Treasury Department," National Park Service Office of Budget (Feb. 27, 1995); A. Teter, "Appropriations from the Land and Water Conservation Fund," National Park Service Office of Budget (Mar. 14, 1994).

land are currently included within the FWS's roster of habitat conservation plans indicates that the FWS is abusing its authority to prohibit "takings" while allowing "incidental takings".[28]

In short, the government has done precisely what it claimed in 1981 could not be done—it has "convert[ed] section 9 into a habitat protection provision" even though that is exclusively "the purpose of sections 5 and 7 of the Act." JA 69.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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[28] *See* FWS, *Status of Habitat Conservation Plans* (Feb. 23, 1995). Copies of this document have been lodged with the Clerk of the Court.